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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 447

Ex Parte JOHN F. BLASKI, PETER S. PEDERSEN, M-P-H MANUFACTURING CORPORATION, INC., PETER S. PEDERSEN, JR., EDWARD MARTIN, and PETER S. PEDERSEN, Co-Partners, Doing Business as Central Farm Equipment Company.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR R. P. HOWELL, JR. AND LIFETIME METAL BUILDING COMPANY, IN OPPOSITION

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INDEX TO BRIEF IN OPPOSITION

	Page
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement of the Case	4
Reasons for Not Granting the Writ	4
Conclusion	11

Cases Cited

	Page
Anthony v. Kaufman, 2d Cir. 1951, 193 F. 2d 85, cert. den. 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710	8, 9
Ex parte Collett, 337 U. S. 55	4
Detroit Motor Appliance Co. v. Taylor, et al., 4 F. Supp. 529	7
Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222	5
General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430	6
Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F. 2d 433, 438	6
Hill v. Upper Mississippi Towing Corp., (D. C. Minn. 1956), 141 F. Supp. 692	9
In re Josephson, 1 Cir. 1954, 218 F. 2d 174	8
Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653	6
Paramount Pictures, Inc. v. Rodney, 3 Cir. 1951, 186 F. 2d 111, cert. den. 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687	8
Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379	4
Rhodes v. Barnett (D. C., S. D. N. Y. 1953), 117 F. Supp. 312	8
Shapiro v. Bonanza Hotel Co., 185 F. 2d 772	2, 7
Torres v. Walsh, 2d Cir. 1955, 221 F. 2d 319	8

Statutes Cited

Title 28, U. S. C.:	
Section 1338	3
Section 1338(a)	4
Section 1400(b)	4, 5
Section 1404	2
Section 1404(a)	3, 5, 8, 11

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R. P. Howell, Jr. and Lifetime Metal Building Company, defendants in the patent infringement suit in the District Court wherein the order for change of venue complained about by petitioners was granted, oppose the petition for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 14, 1957.

JURISDICTION

None of the grounds on which petitioners attempt to invoke jurisdiction of this Court is sufficient because:

(1) There is no conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decisions of this Court cited by petitioners.

(2) There is no conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decision of the Court of Appeals for the Ninth Circuit cited by petitioners, that is, *Shapiro v. Bonanza Hotel Co. (C. C. A. 9, 1950), 185 F. 2d 777, 780.* In the *Shapiro* case the Court of Appeals for the Ninth Circuit simply held that *Title 28, U. S. C. A., Section 1404,* did not permit a *plaintiff* to cause an action to be transferred *over the defendant's objection* to a forum where jurisdiction over the person of the defendant could not have been obtained without defendant's voluntary appearance.

(3) Any conflict between the decision of the Court of Appeals for the Fifth Circuit in this case and the decisions of District Courts in other Circuits is not sufficient grounds to invoke the jurisdiction of this Court. Other decisions of District Courts (not cited by petitioners) are in support of the decision of the Court of Appeals for the Fifth Circuit.

QUESTION PRESENTED

Petitioners incorrectly state the nature of the question which they undertake to present to this Court by assuming that the patent infringement action in this case could not have been brought in the District to which it was transferred. They overlook defendants' waiver of their privilege of objecting to the venue in that District to which the action was transferred. More accurately stated, the question which petitioners undertake to present herein is:

> Would the District Court have the *power* under *Title 28, U. S. C. A. Section 1404(a)*, to transfer the case to another district upon defendants' motion and defendants' agreement to appear in the transferee district and waive their personal privilege as to venue in the transferee district.

STATUTES INVOLVED

This case also involves, in addition to the statutes set out in the petition for certiorari, the statute pertaining to jurisdiction of actions arising under statutes relating to patents, namely:

> "Title 28, U. S. C. A.
>
> "Sec. 1338. Patents, copyrights, trade-marks, and unfair competition
>
> "(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases."

STATEMENT OF THE CASE

The following portion of petitioners' statement of the case is inaccurate, argumentative, and improperly included in the statement of the case and constitutes an insupportable conclusion:

> "Hence, it will be seen that venue was proper in the Northern District of Texas, and would not have been proper in the Northern District of Illinois under Title 28, U. S. C. A., Sec. 1400(b)."

By way of opposition to the petition for certiorari, it is submitted that venue would have been proper in the Northern District of Illinois under *Title 28, U. S. C. A., Sections 1338(a) and 1400(b)*, because defendants specifically waived their privilege to object to such venue. The record in the court below includes defendants' motion for change of venue which contains the following specific waiver:

> "(j) As a part of this motion defendants waive their right to object to venue being properly had in the said United States District Court for the Northern District of Illinois, Eastern Division, * * *."

REASONS FOR NOT GRANTING THE WRIT

1. The claimed conflict with decisions of this Court does not exist.

Ex Parte Collett, 337 U. S. 55, merely held that the trial court correctly transferred an action upon defendants' motion from Illinois to Kentucky.

Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379, held that Section 1404(a) of the Judicial Code did

not devitalize the holding in *Miles v. Illinois Central Railroad Co., 315 U. S. 698*, which, in turn, held that Section 6 of the Federal Employers' Liability Act displaced the traditional "power of a State Court to enjoin its citizens, on the ground of oppressiveness * * * from suing * * * in the State Court of another state * * *."

Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, merely held that a patent infringement suit was properly dismissed for lack of venue upon defendant's motion.

The decision of the court below is not contrary to the provisions of *Sections 1400(b) and 1404(a), Title 28, U. S. C. A.*

This is a patent infringement action. *Section 1338, Title 28, U. S. C. A.*, grants to any United States District Court original jurisdiction of such action. *Section 1400(b), Title 28, U. S. C. A.*, confers a personal privilege to the defendant in a patent infringement action to be sued only in the judicial district where he resides or has committed acts of infringement or has a regular and established place of business. That privilege is personal to the defendant and may be waived.

Admittedly, the provisions of *Section 1400(b)* control the venue privilege granted to defendants in patent infringement actions and the general venue statute which creates a venue privilege in defendants in general cases is not applicable. But both the patent infringement venue statute and

the general venue statute confer personal privileges upon defendants which may be waived.

This Court has held in *General Electric Co. v. Marvel Rare Metals Co., 287 U. S. 430*, that the venue statute pertaining to patent infringement suits simply "* * * confers upon defendants in patent cases a privilege in respect of the places in which suits may be maintained against them. And that privilege may be waived. *Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653; Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F. 2d 433, 438.*"

Similarly, this Court held in *Lee v. Chesapeake & Ohio Ry. Co., 260 U. S. 653*, that the statute specifying proper venue in diversity cases does not "limit the general jurisdiction of the District Court or withdraw any suit therefrom but merely confers a personal privilege on the defendant, which he may assert, or may waive, at his election, and does waive if, when sued in some other district, he enters an appearance without claiming his privilege."

In *Gulf Smokeless Coal Co. v. Sutton, Steele & Steele, 35 F. 2d 433*, Circuit Judge Parker, speaking for the Fourth Circuit, held that the patent venue statute confers a personal privilege upon the defendant which he may waive:

> "* * * It is true that the statute requires that suit for the infringement of letters patent shall be brought in the district of which defendant is a resident, or has committed acts of infringement and has a regular and established place of business. Judicial Code, Sec. 48, 28 U. S. C. A., Sec. 109; W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 S. Ct. 458, 59 L. Ed. 808; Winterbottom v. Casey (D. C.), 283 F. 518.

> * * * This statutory provision, however, does not affect the jurisdiction of the court, which is conferred by section 24(7) of the Judicial Code, 28 U. S. C. A., Sec. 41(7). Its effect is to confer a privilege personal to the defendant, which he may waive. He waives it if he does not, prior to entering a general appearance in the action, take objection in the proper form to the jurisdiction of the court over him. Sandusky Foundry & Machine Co. v. Delavaud (D. C.), 251 F. 631; Victor Talking Machine Co. v. Brunswick-Balke-Collender Co. (D. C.), 279 F. 758; U. S. Expansion Bolt Co. v. H. G. Kroncke Hardware Co. (D. C.), 216 F. 186; Thomson-Houston Electric Co. v. Electrose Mfg. Co. (C. C.), 155 F. 543; In re Moore, 209 U. S. 490, 501, et seq., 28 S. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; Thames & Mersey Marine Ins. Co. v. U. S., 237 U. S. 19, 35 S. Ct. 496, 59 L. Ed. 821, Ann. Cas. 1915D, 1087." (P. 438.)

A similar holding is found in *Detroit Motor Appliance Co. v. Taylor, et al., (D. C., E. D. Ill., 1933), 4 F. Supp. 529.*

2. Petitioners have misconstrued the holding of the Court of Appeals for the Ninth Circuit in *Shapiro v. Bonanza Hotel Co., 185 F. 2d 777*, which is not applicable and is not in point, and is not in conflict with the decision of the court below. The District Court in Nevada denied *plaintiff's motion for a change of venue* on the ground of witnesses' convenience. The defendants did not consent to the change of venue, but objected to the change of venue and pointed out that they were not amenable to process in the District to which the plaintiffs sought to transfer venue. That is the exact opposite of the instant case, where the *defendants* moved to transfer and specifically waived their right to object to jurisdiction and venue in the transferee District.

The decision of the Court of Appeals for the Fifth Circuit in this case cites several decisions of Circuit Courts in support of the rule that transfer of the case under Section 1404(a), Title 28, U. S. C. A., is permitted upon the motion or with the consent of the defendants even though they could not have been served with process of the transferee court. *Paramount Pictures, Inc. v. Rodney, 3 Cir. 1951, 186 F. 2d 111, cert. den. 340 U. S. 953, 71 S. Ct. 572, 95 L. Ed. 687; Anthony v. Kaufman, 2d Cir. 1951, 193 F. 2d 85, cert. den. 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; In re Josephson, 1 Cir. 1954, 218 F. 2d 174; Torres v. Walsh, 2nd Cir. 1955, 221 F. 2d 319.*

In addition, we cite the following recent decisions of District Courts supporting the decision of the Court of Appeals for the Fifth Circuit in this case:

a) *Rhodes v. Barnett (D. C., S. D. N. Y. 1953), 117 F. Supp. 312,* holding, in a tort action commenced in New York by citizens of South Carolina against a Delaware corporation which was doing business in New York, that the corporation could waive its statutory right to insist upon venue in New York and could properly move for a transfer to South Carolina under the provisions of Section 1404(a):

> "In resisting transfer to the District Court in South Carolina plaintiffs maintain that such forum is one where venue cannot be had for this suit. In making this motion defendant has explicitly waived the statutory venue requirement, as it may properly do. Consequently plaintiffs' principal objection to transfer vanishes." Citing

Anthony v. RKO Radio Pictures, D. C., 103 F. Supp. 56, affirmed 2 Cir., sub. nom.; Anthony v. Kaufman, 2 Cir., 193 F. 2d 85, certiorari denied, 342 U. S. 955, 72 S. Ct. 629, 96 L. Ed. 710; Paramount Pictures v. Rodney, 3 Cir., 186 F. 2d 111.

b) *Hill v. Upper Mississippi Towing Corp. (D. C., Minn. 1956), 141 F. Supp. 692:*

"A motion for change of venue presupposes two districts in which there is proper venue, and in which there is or may be jurisdiction of the defendant. This is the implication of the words 'might have been brought' contained in Sec. 1404(a).

"The first issue is: Could the action have been brought in the Western District of Tennessee within the meaning of Sec. 1404(a)? The answer, in my view, is yes.

"It may be wise at the outset to note the final sentence of the Jones Act, 46 U. S. C. A., sec. 688:

> "'* * * Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.'

"The word 'jurisdiction' as used here means 'venue.' See Panama Railroad Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748. In that case the Court held that the Jones Act was not intended to impose a jurisdictional requirement on actions brought under that Act; such actions are subject only to the general jurisdictional provisions applicable to district courts, now contained in Secs. 1331 and 1332 of the Judicial Code, 28 U. S. C. A. See 264 U. S. at pages 384-385, 44 S. Ct. at pages 392-393.

"The defendant corporation in this case has its principal office in Minneapolis, Minnesota, and venue has been properly laid in this district. But the venue requirement of the Jones Act does not dictate the only forum in which the action may be tried. Venue provisions merely confer upon the defendant a personal privilege which may be waived. Panama Railroad Co. v. Johnson, supra. By moving for a change of venue, the defendant has consented to make a general appearance to contest the action on its merits in Memphis and has necessarily waived any objections to venue and jurisdiction. This consent by defendant qualifies the Western District of Tennessee as a place where the action '* * * might have been brought' within the meaning of 28 U. S. C. A., Sec. 1404(a). The cases clearly so hold. Paramount Pictures v. Rodney, 3 Cir., 186 F. 2d 111, 114; Anthony v. Kaufman, 2 Cir., 193 F. 2d 85; Ferguson v. Ford Motor Co., D. C. S. D. N. Y., 89 F. Supp. 45, appeal dismissed, sub nom. Ford Motor Co. v. Ryan, 2 Cir., 182 F. 2d 329, certiorari denied 340 U. S. 851, 71 S. Ct. 79, 95 L. Ed. 624, and Glasfloss Corp. v. Owens-Corning Fiberglass Corp., D. C. S. D. N. Y., 90 F. Supp. 967."

In short, the petitioners are saying to this Court that venue statutes provide for jurisdiction, whereas the rule is well settled that venue statutes provide a personal privilege which may be waived by defendants. In the instant case the action "might have been brought" in the transferee district because *Section 1338(a) of Title 28, U. S. C. A.*, gave such district jurisdiction of the action, and venue was proper by reason of defendants' waiver of their venue privilege.

Accordingly, the District Court in the instant case, having found that it was for the convenience of the parties and witnesses and in the interest of justice to do so, properly transferred the action to the district in which plaintiffs reside, and such transfer was permitted by *Section 1404(a) of Title 28, U. S. C. A.*

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit in this case is entirely correct. The grounds upon which petitioners seek certiorari herein are not well founded. The petition should be denied.

Respectfully submitted,

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